

EPA Draft Guidance for Implementing EO 13175
“Consultation and Coordination with Indian Tribal Governments”

1. Goals of Executive Order 13175

- To establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications
- To strengthen the government-to-government relationships with Indian tribes.
- To reduce the imposition of unfunded mandates on Tribal governments.

2. Purposes of the Draft Guidance

- To establish specific, practical, and achievable internal agency procedures to realize the goals of the EO
- Guidance intended for EPA managers and staff involved in planning and/or developing actions such as regulations, legislative comments or proposed legislation, or other policy statement or actions.

3. Timeline

- Nov 2000: EO signed by Pres. Clinton and published in the Federal Register
- Jan 2001: EO went into effect
- Aug 2001: Internal EPA workgroup established
- Sept 2001: Gov. Whitman sends a letter to all tribes asking for input on how to interpret the EO
- Oct 2001: 9 tribal representatives and alternates are selected by their respective regional tribal caucuses to advise the EPA workgroup
- Nov 2001: Gov. Whitman met with tribal representatives in Washington DC to initiate the work
- Nov 2001 to May 2002: tribal representatives advised the workgroup
- May 2002 to Oct 2004: EO workgroup drafted guidance with input throughout EPA

- April 19, 2006: Draft guidance published in the Federal Register
- July 18, 2006: Comment period ends

4. Fundamental Principles and Policy-making Criteria

- The U.S. has a **unique relationship** with Indian tribal governments as set forth in the Constitution, treaties, statutes, Executive Orders, and court decisions.
- Tribes have the **right to self-government, sovereignty, and self-determination**.
- The federal government works with Tribes on a **government to government** basis to address issues concerning Tribal self-government, Tribal trust resources and Tribal treaty and other rights.
- EPA will grant the maximum administrative discretion possible regarding federal statutes and regulations administered by Tribes.
- EPA will encourage Tribes to develop their own policies to achieve program objectives, and encourage Tribes to establish standards.
- When deciding whether to establish Federal standards, EPA will consult with Tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of tribes.

5. What is Subject to EO 13175?

Policies that have tribal implications, which are defined as:

regulations, legislative comments, proposed legislation, and other policy statements or actions that have **substantial direct effects** on:

- one or more Indian tribes, or
- the relationship between the Federal government and Indian tribes, or
- the distribution of power and responsibilities between the Federal government and Indian tribes.

6. Examples of Actions That May Have Tribal Implications, (i.e. substantial and direct effects)

- Direct impact on tribal natural resources and trust lands
- Direct impacts on treaty rights applicable to lands outside reservation boundaries.

- Direct impacts the authority of Tribal governments.

Note: Tribal implications analysis should be done with representatives of EPA's Indian Program, OGC, the Regulatory Steering Committee, and tribal representatives when appropriate

7. What is Consultation under the Draft Guidance?

- A meaningful and timely two-way exchange with Tribal officials
- in developing Agency actions,
- providing for open sharing of information,
- the full expression of Tribal and EPA views,
- a commitment to consider Tribal views in decision-making, and
- respect for Tribal self-government and sovereignty,
- to the extent practicable and permitted by law.

8. Who are 'Tribal officials' under the EO?

- Elected or duly appointed officials of Indian Tribal governments or authorized intertribal organizations.

Who are Duly Appointed Officials?

- Representatives that have been officially designated by elected or duly-appointed leaders of federally recognized Tribal governments to represent their Tribes on a particular issue.
- EPA would generally recognize a representative of a Tribal government as a "duly appointed official" after receiving confirmation from an elected or duly-appointed Tribal leader that the representative is authorized to consult with EPA on the Tribe's behalf. EPA recommends that such confirmation be provided in writing (e.g., letter, e-mail).

9. When is Consultation Required?

Regulations with tribal implications that:

- 1) impose substantial direct compliance costs and are not required by statute, or
- 2) preempt tribal law, or
- 3) establish Federal standards

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10. What activities must be done under these circumstances?

- Consult with tribal officials early in the process of developing the proposed regulation
- Include in the preamble to the rule a separate tribal impact statement describing

the extent of the prior consultation with tribal officials,
a summary of the nature of tribal concerns,
EPA's position supporting the need to issue the rule, and
a statement of the extent to which the concerns of have been met.
- For draft final regulations that has tribal implications pursuant to Executive Order 12866, include a certification from the EO compliance official (AIEO Director)

11. What about regulations and other actions where consultation is not required?

Includes actions with tribal implications (except for the 3 kinds of regulations described above) and all actions without tribal implications

- Actions with tribal implications

Consultation is recommended. Other policies and laws may also apply.

- Example: Waivers

- The Agency should take appropriate steps to streamline procedures for waivers from statutory or regulatory requirements that Tribes seek if the statute gives EPA discretion to waive some or all of the requirements.
- EPA will consider tribal applications for waivers with a general view toward increasing opportunities for flexible policy approaches at the tribal level, where consistent with applicable federal policy objectives and otherwise appropriate, and to the extent practicable and permitted by law.
- EPA Agency should seek to render a decision within 120 days of receipt of a complete application

- Example: Legislation Proposed by the Agency

- Ensure that the proposed legislation is consistent with the policymaking criteria of the Executive Order

- Prior to submittal to OMB, obtain a letter of certification from EPA's compliance officer (AIEO Director)

Actions without tribal implications

The EO does not apply. Other Policies and Laws May Apply.

- *Example: Permits and licenses* that do not require any direct action or compliance by Tribal governments are presumed not to have tribal implications
- *Example: Policy statements, guidance documents, strategies, guidelines, and interpretive documents* that do not create legally binding requirements, are presumed not to have tribal implications

12. Other Potentially Applicable Law and Policies Related to Tribal Consultation

- EPA's 1984 Indian Policy

The Agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments.

- 1994 Presidential Memorandum regarding the Government-to-Government Relations With Native American Tribal Governments, requires agencies
 - to consult, to the greatest extent practicable and to the extent permitted by law, with Tribal Governments prior to taking actions that affect federally-recognized Tribal Governments and
 - to assess the impact of federal plans, projects, programs, and activities on Tribal trust resources and assure that Tribal Government rights and concerns are considered during the development of such plans, projects, programs, and activities.
- OECA's Tribal Enforcement Guidance
- Regional Tribal Consultation Documents (e.g. Regions 4, 8, 9 and 10)
- Statutory examples: Applicable provisions of NAGPRA, NHPA, ESA, CERCLA and NEPA

13. How Would EPA Implement Tribal Consultation?

- Develop a Tribal Consultation Plan

- Coordination and Outreach

Coordination and Outreach provides for early information exchange, issue education, problem identification, and establishment of consultation protocols, providing the template for tribal consultation.

- Internal Coordination should include, where applicable
 - Tribal Liaison in the HQ Office
 - Regional Indian Coordinator
 - RSC representative and Regional Regulatory Contact
 - American Indian Environmental Office representative
- External Coordination and Outreach (examples)
 - EPA will distribute the Regulatory Agenda, and ask Tribes and Tribal organizations to identify those rulemakings with Tribal Implications.
 - EPA will work through existing networks with Tribes (e.g., NTC, RTCs, intertribal consortia, individual tribes)

- Template for successful coordination and outreach

- Extent of potential tribal impact explained to tribes in a timely and meaningful manner prior to consultation
- All Potentially impacted Tribes Identified
- Tribal officials identified
- Opportunities and venues for consultation established

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